

Air Transit, Inc. and Automotive, Petroleum, Cylinder and Bottled Gas, Chemical Drivers, Helpers and Allied Workers and Public Transportation Employees, Local Union 922, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petition. Case 5-RC-11658

21 August 1984

DECISION ON REVIEW AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 9 November 1981 the Acting Regional Director for Region 5 issued a Decision and Direction of Election in a unit of all regular and part-time taxicab drivers at the Dulles Airport taxistand operated by Air Transit, Inc. (the Company), including owner-drivers and second drivers. The Company filed a timely request for review of the decision, contending that the Acting Regional Director erred by failing to find the drivers independent contractors whom Section 2(3) excludes from coverage of the National Labor Relations Act.¹

The National Labor Relations Board granted the request for review by telegraphic order dated 21 December 1981. The Company filed a brief on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case and makes the following findings:

I. THE FACTS OF AIR TRANSIT III

The Company operates a taxicab service at Dulles Airport in Loudon County, Virginia, under a contract with the Federal Aviation Administration (FAA). The Company orally contracts with some 90 drivers who operate the cabs. The drivers own their cabs² and pay weekly stand dues to the Company in exchange for the right to conduct business at the Company's Dulles taxistand. Stand dues are the Company's only source of income from its Dulles operation.

The drivers receive no wages or benefits from the Company. Their only source of income is the fares received from transporting passengers. The

drivers make no reports to the Company regarding the number of trips made, the fares received, their daily schedule, or the number of hours driven.

The drivers secure the right to operate their cabs at Dulles by obtaining a "number," which is a slot or space on the roster of drivers. The Company's Dulles roster has slots for 89 taxicabs. A number may be obtained free of charge from the Company or by purchase on the open market from a departing driver. A "free" number becomes available when a departing driver returns his number to the Company instead of selling it on the open market. The departing driver receives no remuneration, and an incoming driver pays no fee for the number. There are few free numbers available, and anyone desiring a free number must place his name on a waiting list.

The purchase of a number from a departing driver occurs far more frequently. Buying a number allows the incoming driver to sidestep the waiting list and begin work immediately.³ A number's selling price is based on supply and demand and on the profitability of the cab business.⁴ Departing drivers often sell their vehicles in addition to their numbers, and vehicles have been sold for amounts exceeding their market value.

As proved by the FAA contract, all cabs are identically painted and marked and display the legend "Airport Cab." The drivers are responsible for having their cabs painted, and some drivers have also stenciled their own names on the cab doors.⁵

The central feature of the Company's Dulles operation is the "feed line," which functions as follows: The first cab takes the first person requesting service, and so on down the line, on a "first-in, first-out" principle, except for "short hauls." A driver returning from a short haul takes the first place in the feed line instead of the last.

The Company provides a dispatcher to regulate the feed line between 3 and 11 p.m. During the rest of the day, the drivers themselves maintain the line.⁶ The Company may "spot-check" the cabs'

¹ The status of the Company's drivers has previously been reviewed. In *Air Transit, Inc.*, 248 NLRB 1302 (1980) (*Air Transit I*), aff'd. in the summary judgment proceeding 256 NLRB 278 (1981) (*Air Transit II*), enf. denied 679 F.2d 1095 (4th Cir. 1982), the Board found that the owner-drivers and second drivers were statutory employees rather than independent contractors, but the Fourth Circuit disagreed and reversed. We refer to the instant case as *Air Transit III*.

² The drivers are responsible for the cab's purchase, financing, insurance, and maintenance. "Second drivers" sublease cabs from the owner-drivers (drivers).

³ All incoming drivers meet with the Company's general manager to provide an address for billing of stand dues. The general manager also determines whether the new driver has sufficient funds to purchase the cab and whether the requisite insurance has been obtained.

⁴ One driver testified that she paid \$5000 for her number even though business was slow because "there was a gamble that Congress was going to bring a lot of flights out from National [Airport]."

⁵ The contract with the FAA also provides that the cabs must be clean, safe, and suitable; that a minimum of 60 cabs provide heat and air conditioning; and that each vehicle be less than 2 years old.

⁶ The FAA contract requires that the Company establish and operate a personnel and taxicab dispatch and control system to provide for effective scheduling and utilization of cabs and personnel; that all cabs be loaded and unloaded promptly, carefully, courteously, and efficiently without cost to the passenger; and that the Company provide readable

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condition while on the feed line. Cabs without a valid inspection sticker or working lights have been denied access to the Company's taxistand until the condition has been remedied.

The FAA contract requires the drivers to accept all passenger assignments. The drivers occasionally "swap" passengers, and some drivers make advance arrangements with customers to meet a particular flight. Some drivers carry business cards and distribute them to fares to develop a clientele. Certain drivers allow their customers to charge fares on credit, while others accept personal checks.

The Government controls the fare schedule. The FAA requires that each cab have a meter, which is preset according to rates the Washington Metropolitan Area Transit Commission establishes, and that fares be posted. The Company, however, has negotiated "flat-fare" rates with two companies. Despite fare regulations, drivers often negotiate flat rates with individual customers and do not run the meter for the duration of the trip.

As the FAA contract requires, some of the cabs have two-way radios. The drivers with two-way radios in the cabs area available for calls to pick up passengers bound for Dulles. If no radio-equipped driver is available, the first driver on the feed line is dispatched. Drivers with two-way radios are not required to accept a radio call.

The Federal Government oversees the drivers' operations in other ways. Government regulations provide that a driver may not solicit passengers, must permit airport police to inspect his name tag and rate schedule, must remain in the cab while waiting to enter the feed line or while in the feed line, and must obey all lawful directions of dispatchers.⁷

Subleasing is defined as the driver's use of a second driver. Only three drivers sublease their cabs on an "official" basis.⁸ Subleasing appears to be "officially" permissible only when a driver is on vacation. Many drivers do sublease their cabs, however, without company interference.

The drivers must insure their cabs as required by the Commonwealth of Virginia and Loudon County, where Dulles Airport is located. Loudon

County requires more insurance coverage than does the Commonwealth.

No formal records are kept of customer complaints. If a complaint is serious, the Company may ask the driver about the circumstances. The Company has, on occasion, refunded part of a fare, but has never asked a driver to reimburse the Company. During a 3-month period in 1981, the Company's general manager, Van D. Wright, received approximately 15-18 customer complaints but took no action against any driver.⁹

The Company and drivers met in August and September 1981 to discuss the taxicab operation. The Company initiated the August meeting to introduce the new general manager (Wright). The drivers used this occasion to raise other matters, and voted to eliminate Gate 4 from a list of allowable short hauls. One driver raised the issue of possible sanctions against drivers who refuse short hauls or cut into the feed line. No decision was reached.

Wright called the September meeting to discuss overdue stand dues. The sanction issue was again raised but not resolved. Wright suggested that the drivers form a committee to work out guidelines. It is not clear whether a committee has actually been formed, although the drivers have discussed the matter.¹⁰

II. ANALYSIS AND CONCLUSIONS

The Company contends that the drivers are independent contractors and that the Acting Regional Director erred when he found "no determinative distinctions between those facts now present and those relied upon by the Board in [*Air Transit I*]." The Company also contends that the drivers have always been independent contractors and that the Board's *Air Transit I* decision is in error.

The Company's latter contention is correct, and we shall overrule the Board's *Air Transit I* holding. We reject the *Air Transit I* analysis as well as its consideration of the evidence.¹¹ We therefore find it unnecessary to consider whether the Acting Regional Director erred by finding no determinative

name tags and require dispatchers and drivers to be uniformed in a manner approved by the Government.

Concerning what the FAA contract terms "Employees of Contract," the contract provides that the contractor shall: if the Government in writing so directs, require uniforms or badges; that the contractor shall not hire or permit to remain on the premises any person declared unfit for service or otherwise objectionable; that the contractor shall require its employees to be impartial and courteous in dealing with the public; and that the contractor shall prohibit loud, noisy, and persistent announcement of its services.

⁷ See "Motor vehicles carrying passengers for hire on Dulles International Airport," 14 CFR § 159.4 (1981).

⁸ As to these, each driver and each second driver pays stand dues.

⁹ On one occasion, an intoxicated second driver hit an airport sign. The driver dismissed the second driver on the recommendation of the airport police. Wright merely relayed the police's recommendation to the driver.

¹⁰ A similar meeting took place before Wright's arrival, the drivers then made a decision concerning sanctions to be taken against a driver who was speeding on Xerox property. The drivers also voted to alternate driving days during the holidays. The minutes of a December 1979 company-driver meeting details decisions, mutually reached, concerning feed line operations, the waiting pad, and scrip-pricing (use of the meter when transporting a group paying with airline scrip).

¹¹ We agree generally with former Member Penello's *Air Transit I* dissent, which concluded that the drivers were independent contractors.

factual distinction between *Air Transit I* and *Air Transit III*.¹²

A. The Applicable Legal Principles

Section 2(3) excludes independent contractors from coverage by the National Labor Relations Act. A determination of independent contractor status is governed by normal agency principles,¹³ most importantly the "right of control" test the Board set forth in *News Syndicate Co.*, 164 NLRB 422, 423-424 (1967):

Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

The Court of Appeals for the District of Columbia Circuit refined the meaning of "right of control" in a leading case involving the independent contractor status of taxicab drivers who leased their vehicles for a flat fee. In *Seafarers Local 777 (Yellow Cab) v. NLRB*,¹⁴ the court stated:

Although this test essentially requires an "all of the circumstances" approach and no one factor is determinative . . . the extent of the actual supervision exercised by a putative employer over the "means and manner" of the workers' performance is the most important element to be considered in determining whether or not one is dealing with independent contractors or employees.

The court concluded:¹⁵

When a driver pays a fixed rental, regardless of his earnings on a particular day, and when he retains all the fares he collects without having to account to the company in any way, there is a strong inference that the cab company involved does not exert control over "the means and manner" of his performance. This

conclusion is justified because under such circumstances, the company simply would have no financial incentive to exert control over its drivers, other than such as is necessary to immunize the proprietor of a cab from liability which arises from its operation by virtue of the lessor's ownership. However the driver conducts his occupation, the company has received its financial reward and the cab driver's self interest in the success of his venture and the municipal regulations are some assurance that the cab service will continue to be attractive to customers.

The surrender of the right to make the drivers account for their earning causes a fundamental change in the relationship between the companies and their drivers which will usually remove the latter from the category of "employees."

In sum, the *Yellow Cab* court identified the two dispositive elements as, first, the company's lack of control over the manner and means by which the drivers conduct business after leaving the garage and, second, the lack of any relationship between the company's compensation and the amount of fares collected.¹⁶

The court rejected the argument that Government-imposed regulations constitute company control over drivers. Stating that "Government regulations constitute supervision not by the employer but by the state," the court reasoned that more extensive governmental regulations afford less opportunity for control by the putative employer "because the employer cannot evade the law either and in requiring compliance with the law he is not controlling the driver."¹⁷

B. Application to *Air Transit III*

The drivers here own their vehicles but pay the Company "stand dues," a fixed rental bearing no relationship to daily earnings.¹⁸ The drivers keep what they earn, provide no accounting or trip sheets to the Company,¹⁹ and generally conduct

¹² Member Hunter agrees that *Air Transit I* was decided incorrectly. Contrary to his colleagues, however, Member Hunter concludes that the evidence of changed circumstances in this case, set forth infra, provides an additional basis for finding that the taxi drivers are independent contractors.

¹³ *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968).

¹⁴ 603 F.2d 862, 872-873 (D.C. Cir. 1978). Accord: *Yellow Taxi of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983), denying enf. to 249 NLRB 265 (1980). The Board issued a Supplemental Decision and Order at 262 NLRB 702 (1982) affirming its Order at 249 NLRB 265.

¹⁵ 603 F.2d at 879. Accord: *Air Transit v. NLRB*, 679 F.2d 1095, 1099 (4th Cir. 1982).

¹⁶ 603 F.2d at 880. The court acknowledged the existence of some characteristics of "minor importance" favoring a finding of employee status, such as the unilateral setting of lease terms by the company, a prohibition against subleasing, and the good will inuring to the company from operation of the cabs. Id. at 878 fn. 45.

¹⁷ 603 F.2d at 875. Accord: *Air Transit*, supra at 1100; *SIDA of Hawaii v. NLRB*, 512 F.2d 354, 359 (9th Cir. 1975).

¹⁸ Stand dues must be paid each week without regard to a driver's earnings.

¹⁹ Trip sheets show the number of trips made, the destinations, and the amount charged for each trip.

their business without company supervision. These facts give rise under *Yellow Cab* to a "strong inference" that the Company does not control the "means and manner" of the drivers' performance, and that the drivers are not employees within the meaning of the Act.²⁰

Nearly all the factors allegedly demonstrating control over the manner and means of the drivers' performance of their duties stem from requirements imposed by the FAA contract, Federal regulations, and the Transit Commission, which are detailed above, and thus do not constitute evidence of employer control. The only controls not imposed by the Government appear to be (1) the official prohibition against subleasing (widely ignored in practice), (2) the flat-fare charge to certain corporate customers, and (3) the Company's requirement that the drivers maintain insurance coverage.²¹ We find these to be "minor" factors insufficient to support a finding that the drivers are statutory employees.²² We therefore conclude that the drivers are independent contractors not subject to coverage by the Act.

C. A Reconsideration of *Air Transit I*

We recognize that the Board reached the opposite conclusion on similar facts in *Air Transit I*. As stated previously, however, we have decided to overrule that decision.

The facts of *Air Transit I* and *Air Transit III* are substantially the same. In *Air Transit I*, however, there were some additional factors arguably supporting a finding of employee status. Thus, the Company arranged financing for the purchase of most cabs, although there is no indication that prospective drivers were required to obtain financing from the Company. The Company also prohibited drivers from working a double shift, and could alter the particular shift a driver worked; prohibited socializing with "outlaw" cabs;²³ prohibited drivers from picking up fares at National Airport; required all flights to be covered; and required drivers to sign a register before starting work. The Company also kept records of customer complaints and driver misconduct.²⁴

²⁰ 603 F.2d at 879.

²¹ As noted above, the Commonwealth and County require certain levels of insurance coverage. The record does not clearly reflect whether the Company requires more insurance than the levels set by governmental regulations.

²² See generally the Fourth Circuit's decision denying enforcement to *Air Transit II*, 679 F.2d at 1100.

²³ "Outlaws" apparently do business at Dulles without a company number or slot.

²⁴ Member Hunter, as noted, finds that *Air Transit I* is distinguishable from the present situation based on these facts.

In agreement with the Fourth Circuit's decision denying enforcement to *Air Transit II*, we hold that such factors do not outweigh the dispositive factors of the Company's lack of control over the means and manner of the drivers' performance and the drivers' nonaccountability to the Company for their earnings. We particularly stress that the Company's earnings were based on the number of drivers paying stand dues.

Finally, we conclude that *Air Transit I*'s reliance on *United Insurance Co.*, 390 U.S. 254, is misplaced. The *United Insurance* Court examined the relationship between insurance debit agents and the company, and concluded that the agents were statutory employees. Rejecting United's contention that the agents were independent contractors, the Court relied on the following evidence: The agents were company-trained, paid by commission, and serviced company customers. The company required that agents turn in all premiums collected and file a weekly report. Agents who failed to maintain their weekly accounts were "cautioned." The company provided detailed written instructions regarding the performance of their duties, and agents were subject to investigation and corrective measures based on complaints.²⁵

Contrary to the facts of *Air Transit I*, United's income rose or fell as a direct result of its debit agents' efforts. United thus had a significant interest and involvement in the manner and means by which the debit agents carried out their duties. *Air Transit I* and *III* are distinguished by the drivers' payment of a flat fee (stand dues) that has no relation to driver earnings and their freedom from company control in conducting business. The Company's income is therefore determined by the number of available slots, and not by driver earnings. As a result, the Company's interest in the manner and means of the drivers' performance is virtually nil.

We therefore overrule *Air Transit I*, find that the *Air Transit I* and *III* drivers were and are independent contractors, and shall order that the *Air Transit III* petition be dismissed.

ORDER

The petition is dismissed.

²⁵ The court also noted that the district managers filed weekly reports with the home office that identified agents with below average records, noted their debits, collection percentages, arrears, and production, and specified any remedial action taken. If an agent's statistics did not improve, the "Agent's Commission Plan" allowed the company to fire the agent at any time.